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Nos. 04-10566 & 05-51

# In the Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,
*Petitioner*,
v.
STATE OF OREGON,
*Respondent*.

MARIO A. BUSTILLO,
*Petitioner*,
v.
GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
*Respondent*.

On Writ of Certiorari
to the Supreme Courts of Oregon and Virginia

## BRIEF OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTIONS PRESENTED

(1) Does the Vienna Convention convey individual rights of consular notification and access to a foreign detainee enforceable in the Courts of the United States?

(2) Whether, contrary to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations, April 24 1963, 21 U.S.T. 77, 100-101, state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or because the treaty does not create individual rights?

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## INTEREST OF *AMICI CURIAE*

The State *amici curiae*, through their Attorneys General, respectfully submit this brief in support of Respondents. Under the Supremacy Clause, the States are bound to observe the terms of Article 36 of the Vienna Convention on Consular Relations, done Apr. 24, 1963, 21 U.S.T. 77, 100-01, 596 U.N.T.S. 261, 292-94. All 50 States have foreign nationals (and alleged foreign nationals) incarcerated in their state prison systems. According to a recent government report, more than 57,000 foreign nationals were incarcerated in State prisons as of mid-2004. Paige M. Harrison & Allen. J. Beck, *Prison and Jail Inmates at Midyear 2004* (Table 6), http://www.ojp.usdoj.gov/bjs/abstract/pjim04.htm (last revised April 24, 2005).

This case will determine whether the Vienna Convention creates individual rights enforceable in American Courts and, if so, whether those rights displace well-established criminal-procedure doctrines applied across the country. Because the resolution of the issues presented in this case may profoundly affect every State criminal-justice system, the States have a substantial interest in opposing Petitioners' attempt to create judicially-enforceable rights and implied procedural requirements in the Vienna Convention.

## SUMMARY OF THE ARGUMENT

**The Vienna Convention does not create individual rights:** The Vienna Convention, by its own terms, defines the reciprocal rights and obligations of nations in the exchange of consuls. It expressly disavows the creation of individual rights. Although some incidental language in Article 36 of the Convention might be read, in isolation, as discussing individual rights, it is insufficient to overcome the presumption that a treaty does not create individual rights absent a clear and unambiguous statement to that effect. This presumption prevents the courts from inadvertently expanding treaties beyond the President's and the Senate's intent in entering into and ratifying them. In this case, the Senate ratified the Convention under the belief that it would not change the existing

laws of the United States. This confirms that the Convention should not be read to change United States domestic law.

**The Vienna Convention Does Not Impose Judicial Requirements on the United States:** The Petitioners and their *amici* argue that the Vienna Convention enacted two procedural requirements as federal law: abrogation of the procedural-default doctrine and adoption of an exclusionary rule regarding consular-notification failures. The text of the Convention does not establish those requirements.

Like the state courts, the judiciaries of other nations have universally refused to apply Article 36 of the Vienna Convention in the way the Petitioners seek. The Court should not interpret the holdings of the International Court of Justice or the amicus briefs filed in this case by foreign sovereigns as an indication that the treaty is so applied abroad. "Litigation" before the ICJ is part of a political and diplomatic—not a legal—dispute-resolution mechanism that ultimately results in political negotiation at the level of the U.N. Security Council. The foreign nations that accord additional procedural rights based on consular notification do so based on their own domestic statutes or common-law authority, not based on the Vienna Convention as such.

**The Court Should Maintain its Reluctance to Interfere in the States' Criminal-Procedure Systems Absent a Violation of the U.S. Constitution:** Petitioners ask the Court to change U.S. law despite the Senate's understanding that the Vienna Convention would not change United States domestic law. Petitioners and *amici* argue that changing the States' criminal-procedure laws will serve as a more effective way to implement the Convention and will benefit the United States diplomatically. These policy justifications, even if true, are political, rather than legal. Such policy balancing is best left to the political branches and to the States, which retain authority to administer their own criminal-justice systems.

State-law procedural default is an adequate and independent state-law ground for refusing to reconsider criminal convictions, and the Court has consistently declined to interfere with the doctrine, even allowing it as a bar to claims brought under the federal Constitution. Petitioners ask the Court to interfere with state criminal procedure without providing basis in the federal Constitution for doing so. The Court should not acountenance such interference, especially given the Court's longstanding recognition of the importance of the procedural-default doctrine to the efficient and fair functioning of the criminal-justice system.

## ARGUMENT

Petitioners frame this case as a dispute between the States of Oregon and Virginia and the federal government regarding the implementation of Article 36 of the Vienna Convention. There is no such dispute—the States fully recognize their obligation to comply with the United States' treaty obligations.

Indeed, on this issue, the States and the United States are of one accord.

The impediment to implementing the Vienna Convention as Petitioners request is not resistance from the States. Instead, the Court's treaty-interpretation precedent, limited as it is by the strictures of the constitutional framework of government, forecloses that result. And rightly so, given that other nations do not consider the Vienna Convention, by itself, to form a basis for invalidating criminal convictions.

### I. THE VIENNA CONVENTION DOES NOT CONFER INDIVIDUAL RIGHTS.

The Vienna Convention on Consular Relations is a 79-article, multilateral treaty negotiated in 1963 and ratified by the United States in 1969. The treaty governs "the establishment of consular relations, [and] defin[es] a consulate's functions in a receiving

state." *United States v. Alvarado-Torres*, 45 F.Supp.2d 986, 988 (S.D. Cal. 1999). Article 36(1)(b) of the Convention states that the authorities of a "receiving state" shall, without delay, inform any detained foreign national of his right to have the consular post of the "sending state" notified of his detention. Article 36(1)(a) provides that consular officers shall be free to communicate with nationals of the sending state, and Article 36(1)(c) gives consular officers the right to visit and correspond with the detained foreign national and to arrange for his legal representation. *Id.*

Both Petitioners argue that Article 36 creates individual rights and that it constitutes binding federal law by virtue of the fact that the Vienna Convention is a self-executing treaty. Sanchez-Llamas Merits Br. at 11-14; Bustillo Merits Br. at 16-20. This reasoning is inconsistent with the text of the Convention itself—the preamble to the Vienna Convention expressly disavows the creation of individual rights, and the Convention's ratification history demonstrates that the Senate did not believe that the Convention would change existing United States law.

### A. The Text of the Vienna Convention Does Not Create Individual Rights.

Treaty provisions are construed according to the traditional rules of statutory construction, and the Court looks first to the plain language. *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning."). As the Court did when construing Article 36 in *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam), it should begin with the Convention's text. The text of the Convention is clear. Neither Article 36 nor the other provisions of Chapter II of the Convention were intended to create individual rights.

**1. The text of the Convention does not require that violations of consular notification be remedied in criminal proceedings.**

The Vienna Convention is based on the premise that "an international convention on consular relations, privileges and immunities would ... contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." VIENNA CONVENTION, preamble. The Convention expressly provides,

> "the purpose of [the] privileges and immunities [discussed in the Convention] is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States." *Id.* (emphasis added).[1]

Chapter II of the Convention, in which Article 36 appears, is entitled "Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and Other Members of a Consular Post." Its focus is the prerogatives of the "sending State," not individual foreign nationals. Article 36, in turn, is in Section I of Chapter II—a Section itself titled "Facilities, Privileges and Immunities Relating to a Consular Post." Notably, Article 36 is not found in Section II, which deals with facilities, privileges, and

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3. The preamble to a treaty is negotiated language that generally sets forth the purpose of the contracting parties in choosing particular words to implement specific obligations. *See Olympic Airways v. Husain*, 540 U.S. 644, 660-61 (2004) (looking to the Warsaw Convention's preamble to determine the purpose of the contracting parties); *El Al Israeli Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 156-57 (1999) (same); *Alvarez-Machain*, 504 U.S., at 672-73 (relying on preamble to extradition treaty with Mexico to determine intent of contracting states).

immunities of individuals, *i.e.*, consular officers and other "members of the consular post."[2]

In keeping with the overall purpose of the Convention, Article 36 begins with the express statement that the provisions of paragraph (1), including the requirements of consular notification at issue in this case, are established "with a view to facilitating the exercise of consular functions relating to nationals of the sending State." Paragraph 2 of Article 36 provides that "rights referred to in paragraph 1" of the Article "shall be exercised in conformity with the laws and regulations of the receiving State," so long as those laws "enable full effect to be given" to the purpose of the rights accorded by Article 36—those purposes being specified as "facilitating the exercise of consular functions" as described in paragraph 1. When Article 36 is violated, the aggrieved party is the sending State, because it is the sending State whose consular operations have been hindered by the violation.

Although Article 36 may provide some collateral benefits to individual foreign nationals, its overriding purpose is to facilitate the performance of consular functions by consular officials. Given that the Convention's preamble expressly states that the purpose of the treaty is not to create individual rights, the Court should reject

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2. Bustillo erroneously argues that the preamble cannot control interpretation of Article 36 because, as a result, the preamble would prevent Section II from conferring rights on consular personnel. Bustillo Merits Br. at. 33 & n.9. Bustillo ignores the fact that Section II does not create rights for foreign citizens generally, but only to consular personnel, as an element of their official duties on behalf of the sending State. *E.g.*, *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 693-94 (1976) (recognizing that the scope of consular privileges and rights is determined by the capacity in which an individual represents a foreign government, and is not held by the individual as such).

Petitioners' invitation to discover such rights in Article 36 — which would directly contravene the negotiated meaning of the treaty.[3]

**2. Article 36 does not overcome the presumption that treaties do not create individual rights.**

The term "self executing" usually is applied to any treaty that according to its terms takes effect upon ratification and requires no separate implementing statute. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111(4) (1987). It is beyond cavil that the Vienna Convention is self-executing in the sense that no implementing legislation was required.

However, whether the terms of a treaty provide for private rights that are enforceable in domestic courts is a wholly separate question. *See id.*, at §111, cmt. h; *see also United States v. Li*, 206 F.3d 56, 68 (CA1 2000) (Selya & Boudin, JJ., concurring) ("That courts sometimes discuss [self-execution in the sense of need for implementing legislation and self-execution as creating individual rights] together ... does not detract from their distinctiveness. At

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3. Notably, the ICJ's judgment in which it declared that Article 36 creates an individual right analyzes the Article in isolation, without mentioning the preamble. *See LaGrand* (F.R. G. v. U S.), 2001 I.C.J. 466 (June 27), ¶67. Vice President Shi's concurrence sheds some light on the ICJ's strategic drafting of paragraph 67, which Vice President Shi criticized for ignoring the preamble's plain text. *See LaGrand*, Separate Opinion of Vice-President Shi, ¶5. Yet, although he believed that "the view that Article 36, paragraph 1, specifically subparagraph (b), creates individual rights is at the very least a questionable one," *id.* ¶16, Vice President Shi nonetheless voted for the portion of the judgment requiring "review and reconsideration of the conviction and sentence," *see LaGrand*, ¶127(7), on the explicit ground that because the case involved the death penalty "every possible measure should be taken to prevent injustice or an error in conviction or sentencing," Separate Opinion of Vice-President Shi, ¶17.

bottom, the questions remain separate."). Petitioners' contention that the Vienna Convention is "self-executing" in the sense that it creates individual rights enforceable in American judicial proceedings, either directly or by virtue of the ICJ's opinions on the issue, is simply incorrect. In light of the principles governing the interpretation of treaties, neither the text nor the history of the Vienna Convention supports Petitioners' claims.

The general rule is that "[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." RESTATEMENT (THIRD) §907, cmt. a. This rule derives from the longstanding principle that "[a] treaty is primarily a compact between independent nations," and that it "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *The Head Money Cases*, 112 U.S. 580, 598 (1884).

Because treaty violations have traditionally been resolved by "international negotiations and reclamations," the Court has concluded that "[i]t is obvious that with all this the judicial courts have nothing to do and can give no redress." *Id.* This principle has consistently been applied by U.S. courts. *See, e.g., Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) (holding that the Geneva Convention on the High Seas and the Pan-American Maritime Neutrality Convention, "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action.").[4]

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4. *See also Goldstar v. United States*, 967 F.2d 965, 968 (CA4 1992) ("International treaties are not presumed to create rights that are privately enforceable."); *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (CA5 2001) ("[Treaties] do not generally create rights that are enforceable in the courts."); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808

Moreover, settled principles of treaty construction obligate the Court to avoid the constitutional conflict that would be occasioned by Petitioners' proposed interpretation. Statutes are "to be so construed so as to avoid serious doubt of their constitutionality." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961). The same canon of constitutional avoidance has always applied to treaties as well. *See Murray v. the Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Thus, if it is "fairly possible" to construe a statute or treaty without contravening the Constitution, the Court should do so. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). The presumption against individual rights is a means of avoiding constitutional conflict—although both treaties and laws are "the law of the land" under the Supremacy Clause, U.S. CONST. art. VI, cl.2, treaties and laws are not automatically the same thing. Treaties fall within the Executive branch's foreign-affairs power, subject to Senate approval, *id.*, art. II, §2, while laws fall within Congress's legislative authority, subject to the Executive's veto, *id.*, art. I, §7. The grants of power are not coextensive. A low standard for determining that a treaty creates individual rights would necessarily lead to potential constitutional

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(CADC 1984) (Bork, J., concurring) ("Treaties of the United States, though the law of the land, do not generally create rights that are privately enforceable in the courts."); *Li*, 206 F.3d, at 66 (Selya & Boudin, JJ., concurring) ("The background presumption that treaties do not create privately enforceable rights . . . [is an] extremely important principle. . . . It is surprisingly difficult to accept the idea that, in most instances, either the Executive Branch or the ratifying Senate imagined that it was empowering federal courts to involve themselves in enforcement on behalf of private parties who might be advantaged or disadvantaged by particular readings of particular treaty provisions."); *accord Garza v. Lappin*, 253 F.3d 918, 924 (CA7 2001) (judgment of Inter-American Court did not bar imposition of death penalty because the treaty relied upon could not be construed to create individual rights); *United States v. Davis*, 767 F.2d 1025, 1030 (CA2 1985).

infirmities, because it would muddy the source of the federal government's authority.

A presumption against the creation of individual rights in treaties avoids potential constitutional infirmities by eliminating most instances in which a treaty could be construed to conflict with existing laws. The Court's cases draw a bright-line distinction. If a treaty either establishes a legal standard for particular type of claim or expressly states that it confers rights on foreign nationals, the Court applies the treaty in domestic courts. Otherwise, it does not. This test preserves the distinction between legislation and treaties; the Senate has the opportunity to evaluate the treaty in terms of any potential resulting change in the law.

For this reason, even treaties that directly benefit private parties are not necessarily construed to create private rights or provide for a private cause of action in domestic courts. For example, in *United States v. Gengler*, 510 F.2d 62, 67 (CA2 1975), the court held that "even where a treaty provides certain benefits for nationals of a particular state—such as fishing rights—it is traditionally held that any rights arising out of such provisions are, under international law, those of the state and ... individual rights are only derivative through states." Likewise, in *United States v. Rosenthal*, 793 F.2d 1214, 1232 (CA11 1986), the court found no merit in the defendants' argument that the actions of the United States violated its extradition treaty with Colombia because "[u]nder international law it is the contracting foreign government that has the right to complain about a violation."

A treaty *can* create individual rights, but only when the text of the treaty does so unambiguously. As recognized in *The Head Money Cases*, a treaty establishing particular "rights of property by

descent or inheritance," gives those obligations the force of law. 112 U.S., at 598.[5]

Both Petitioners provide lists of cases that, they argue, demonstrate that the Court always, without exception, applies treaties to protect private litigants. Sanchez-Llamas Merits Br. at 28-29; Bustillo Merits Br. at 18 & n.3. The referenced cases do not support Petitioners' arguments. Instead, they illustrate the specific and narrow circumstances in which the Court has held that treaties provide judicially-enforceable individual rights. Each treaty either (1) contains an express statement to that effect or (2) expressly adopts a specific legal standard governing cases involving foreign nationals.

Thus, for example, in *Kolovrat v. Oregon*, the treaty stated that "Serbian subjects in the United States[] *shall enjoy the rights*" granted to most-favored nations. 366 U.S. 187, 192 n.6 (1961) (emphasis added). The sole case cited by the Petitioners involving a multilateral convention specifically governed the reciprocal rights of citizens regarding trademarks. *Bacardi Corp. v. Domenech*, 311 U.S. 150, 169 (1940) (discussing section titled "Equality of Citizens and Aliens as to Trade Mark and Commercial Protection"). These

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5. The sole case cited by Petitioners involving the privileges of a foreign consulate in fact rejected Petitioners' position. In *Wildenuhus's Case*, 120 U.S. 1 (1887), the *Belgian Consul* sought to bring a habeas corpus claim regarding a suspect in a murder committed aboard a Belgian vessel anchored in a United States port. In holding that the consul held a right under the bilateral consular-relations treaty between the United States and Belgium, the Court recognized that the treaty "settle[d] and define[d] the rights and duties of the contracting parties", *id.* at 12, and not those of the individual criminal suspect.

treaties create individual rights because they contain *express language* to that effect.[6]

Other treaties expressly establish legal standards. Thus, the two extradition cases Petitioners cite, *United States v. Rauscher*, 119 U.S. 407 (1886), and *Johnson v. Browne* , 205 U.S. 309, 320-22 (1907), recognized that the rule of "specialty" governs extradition treaties as a matter of international custom and therefore informs the courts' application of extradition law. That custom has now been adopted by statute. *See United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992). Likewise, treaties governing seizure of foreign ships expressly create legal standards that apply in admiralty.[7] *Cook v. United States*, 288 U.S. 102, 111-12 (1933);

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6. The most important early cases involve the United States' treaty obligations to protect the property rights of British citizens following independence. The United States had undertaken to guarantee those rights as a condition of peace with Great Britain; accordingly state laws predating adoption of the Constitution could not trump the bargain regarding property rights. *See Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 627 (1812) ("British subjects ... shall continue to hold [their lands]"); *Higgonson v. Mein*, 8 U.S. (4 Cranch) 415, 419 (1808) ("all persons who have any interest in confiscated lands ... shall meet with no lawful impediment in the prosecution of their just rights"); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 103, 110 (1801) (same); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 258-59 (1796).

7. The remaining treaty provisions on which the Court has recognized a treaty right were bilateral treaties of amity and commerce specifically designed to create individual rights for the citizens of foreign countries, including Germany, *Clark v. Allen*, 331 U.S. 503, 514-15 (1947); Denmark, *Nielsen v. Johnson*, 279 U.S. 47, 51 (1929); Japan, *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928), *Asakura v. City of Seattle*, 265 U.S. 332, 340 (1924); China, *Cheung Sum Shee v. Nagle*, 268 U.S. 336, 345; *Chew Heong v. United States*, 112 U.S. 536, 542 (1884); France, *de Geofroy v. Riggs*, 133 U.S. 258, 266 (1890); *Chirac v.*

*United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

Article 36 neither contains language expressly creating an individual right of consular notification, nor does it establish a legal standard for evaluating such lawsuits. It does not, therefore, create a judicially-enforceable individual right under the Court's precedent.

### B. The State Department Has Consistently Construed the Convention Not to Create Individual Rights.

The State Department has consistently maintained that the Vienna Convention does not create individual rights. The United States' historic interpretation of the Vienna Convention should be accorded substantial deference. *See, e.g., El Al Israeli Airlines v. Tseng*, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

In *United States v. Li*, the First Circuit specifically posed the question whether the Vienna Convention creates individual rights, and the State Department advised the court that the Convention is a treaty that establishes state-to-state rights and obligations, not individual rights. *See* 206 F.3d, at 63 (citing "Department of State Answers to the Questions Posed By the First Circuit in United

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*Chirac's Lessee*, 15 U.S. (2 Wheat.) 259, 270 (1817); Switzerland, *Hauenstein v. Lynham*, 100 U.S. 483, 584-86 (1879); and the United Kingdom, *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489, 496 (1824); *Soc'y for Propagation of Gospel v. New-Haven*, 21 U.S. (8 Wheat.) 464 (1823) (same); *Craig v. Radford*, 16 U.S. (3 Wheat.) 594 (1818) (same).

States v. Nai Fook Li," hereinafter "State Department Li Answers," at A-1, A-3). The State Department specifically addressed the remedies for violations of the consular notification procedures: "The [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *Id.* The United States reiterated this history in its *amicus curiae* brief supporting the State of Texas in *Medellin v. Dretke*, No. 04-5928, Brief for the United States as *Amicus Curiae* Supporting Respondent, at 22-23.

As *Li* noted, the State Department's position on the Convention may be traced to the treaty's inception. The court first pointed to a 1970 letter sent by a State Department legal adviser to the governors of the fifty States shortly after the Convention's ratification, advising that the Department did "not believe that the Vienna Convention will require significant departures from the existing practice within the United States." *Id.*, at 64. In 1989, a letter from a Department legal adviser informed a foreign national being held in an American prison that "[w]hile the U.S. authorities are required to comply with the obligations [of Article 36], failure to do so would have no effect on [his] conviction or incarceration." *Id.*

*Li* also pointed to the State Department's written submission to the Inter-American Court of Human Rights in 1998, when Mexico sought an advisory opinion on the availability of criminal remedies for failures of consular notification—the precise issue raised in this case. The Department's submission unequivocally stated that the Vienna Convention "does not require the domestic courts of State parties to take any actions in criminal proceedings, either to give effect to its provisions or to remedy their alleged violation." *Id.* (emphasis added). The *Li* court thus correctly concluded that "the Department has denied the availability of criminal remedies for failures of consular notification." *Id.*

### C. The History of the Convention Does Not Demonstrate an Intent to Create Individual Rights in Article 36.

The plain text of the treaty disclaims individual rights. Even if there were any ambiguity, it should be resolved against finding such rights. When a treaty's terms are considered ambiguous, the Court typically relies upon nontextual sources "such as a treaty's ratification history and its subsequent operation." *United States v. Stuart*, 489 U.S. 353, 366 (1989). Petitioners turn to the ratification history and *travaux préparatoires* of the Convention to suggest that Article 36 was intended to create individual rights. *See* Sanchez-Llamas Merits Br. at 23-26; Bustillo Merits Br. at 24-29. But the passing references to the negotiation and ratification of the Vienna Convention contained in Petitioners' account do not tell the whole story—the United States ratified the treaty under the express condition that it would effect no change in domestic law.

Senate Committee on Foreign Relations Chairman William J. Fulbright's report to the Senate highlighted the treaty's preamble and then listed five factors that helped secure the Committee's approval. The very first such factor was the Committee's belief that the "Vienna Convention *does not change or affect present U.S. laws or practice*." S. Exec. Doc. E app., 91-1, at 46 (1969) (emphasis added). That statement of Senate intent would be incomprehensible if the treaty were in fact understood to create individual rights that could abrogate U.S. statutes and the procedural-default rule in all 50 States, across the criminal-justice system.

Moreover, despite casual statements suggesting the contrary, the State Department's only formal answer to the question whether the Convention created individual rights was altogether negative. A State Department legal adviser submitted written testimony on the Convention to the Senate Committee on Foreign Relations on October 7, 1969. The statement indicated that the "Vienna ... Convention does *not* have the effect of overcoming Federal or State

laws beyond the scope long authorized in existing consular conventions." *Id.* (emphasis added). The Department's testimony also emphasized the Vienna Convention's preamble, which states explicitly that the treaty's purpose is "not to benefit individuals." S. Exec. Doc. E app., 91-1, at 46 (1969).

Nor do the *travaux préparatoires* include more than a passing reference to consular notification being a right held by a citizen. Certainly, the *travaux* include no express indication of an intent to expressly create rights. The passing references to the notification right as belonging to the individual are, therefore, the most convenient mechanism for referring to the reciprocal obligation between nations. *See Li*, 206 F.3d, at 66 (Selya & Boudin, JJ., concurring).[8] Moreover, the Statements from the *travaux* on which the Petitioners rely must be read in context. Article 36 was framed in terms of an individual's choice to contact his national consulate in order to ensure that defectors and captured military officers would not be required to contact their own governments against their wills. *See* 1 U.N. Conference on Consular Relations: Official Records, at 38 ¶ 21; 83-84 ¶¶ 73 & 74, U.N. Doc.A1 Conf.25/16 U.N. Sales No. 63.X.2 (1963). The language was thus drafted as it

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8. *See Li*, 206 F.3d, at 66 (Selya & Boudin, JJ., concurring):

> "It is common ground that the [Convention is an] agreement[ ] among sovereign States. Nothing in [its] text explicitly provides for judicial enforcement of [ ] consular access provisions at the behest of private litigants. Of course, there are references in the treaties to a 'right' of access, but these references are easily explainable. The contracting States are granting each other rights, and telling future detainees that they have a 'right' to communicate with their consul is a means of implementing the treaty obligations *as between States*. Any other way of phrasing the promise . . . would be both artificial and awkward." (emphasis in original).

is in order to limit the scope of the consular nations' rights over its citizens. Nothing in the *travaux* indicates an intent on the part of the parties to the treaty to adopt consular notification as an element of their domestic criminal law.

**D. Fulfilling Treaty Obligations Under Article 36 is the Task of the Political Branches.**

As the Court has long recognized:

> "the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and long have been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Airlines v. Waterman SS Corp.*, 333 U.S. 103, 111-12 (1948).

A nation considering itself harmed by congressional enactment following a treaty may "present its complaint to the executive head of the government.... The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

Nor is the judiciary well suited to determine how the United States should act under a treaty, because the United States has discretion to disregard treaty obligations: the President has the power to waive treaties, *Charlton v. Kelly*, 229 U.S. 447, 475-76 (1913), and Congress may enact inconsistent legislation, *Whitney*, 124 U.S., at 194. The Executive Branch is best-suited to foresee the

implications of its actions regarding treaties because the State Department maintains diplomatic contacts throughout the world. The choice of the best manner in which to fulfill a treaty—or, in the alternative, whether to negotiate for a lesser obligation or even to withdraw from an obligation entirely—is by necessity "delicate" and "complex." As a prudential matter, the courts should not interfere in the process.

## II. THE COURT SHOULD NOT ADOPT THE ICJ'S INTERPRETATION OF ARTICLE 36, WHICH IS CONTRARY TO THE ACTUAL PRACTICE OF PARTIES TO THE VIENNA CONVENTION.

Petitioners do not rely on the decisions of the International Court of Justice in *Avena and Other Mexican Nationals* (Mexico v. U.S.), 2004 I.C.J. 12 (Mar. 31) and *La Grand* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27), as direct authority, although Sanchez-Llamas argues that those decisions deserve deference in the interest of "uniform treaty interpretation." Sanchez-Llamas Merits Br. at 26-28; Bustillo Merits Br. at 30-31. Many of Petitioners' *amici* argue that the Court should defer to the ICJ's interpretation of Article 36. *E.g.*, E.U. *Amicus* Br., at 3-7.[9]

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9. Bustillo's statement that 63 nations have filed briefs in support of his position is somewhat misleading to the extent it includes all of the members of the European Union. Bustillo Merits Br. at 29. The E.U. is not a party to the Vienna Convention and only three of its member nations, Liechtenstein, Norway, and Switzerland, were willing to join the E.U.'s *amicus* brief in their capacity as signatories to the Convention. E.U. *Amicus* Br. at 2. The only reported judicial opinion from an E.U. member country that is also a party to the Convention, Germany, has in fact refused to provide "review and reconsideration" of a criminal conviction based on Article 36. *See* BGH 5 StR 116/0 decided on 7 Nov. 2001, available at http://www.bundesgerichtshof.de (Germany).

These arguments are all based on an untenable premise—that the ICJ's interpretation of Article 36 represents the uniform application of the treaty. It does not, and neither Petitioners nor their *amici* mention a single instance in which another country's courts have revisited a criminal conviction based on a defendant's consular-notification rights absent a domestic statute requiring that result. Nor do other nations apply the ICJ's decisions in their domestic courts as a general matter.

### A. The ICJ's Interpretation of Article 36 is Contrary to Actual International Practice.

In *LaGrand*, the ICJ determined that Article 36 creates individual rights. 2001 I.C.J, at 493, ¶¶73 & 74. And in *Avena*, the ICJ determined that Article 36 mandates "review and reconsideration" of criminal convictions. 2004 I.C.J., at 35-36, ¶40. At the time *LaGrand* was decided in 2001, according to the State Department, no country in the world had interpreted the Vienna Convention to create individual rights or ordered reconsideration of a criminal conviction based on violation of Article 36.[10] Thus, *LaGrand* itself rejected the prevailing, uniform interpretation of the Convention.

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10. After a comprehensive investigation into international practice, the State Department "found no indication that other states party have remedied such failures by granting remedies in the context of their criminal justice proceedings." State Department *Li* Answers at A-8, A-9 (commenting that no party had produced a single example of a nation providing a judicial remedy for Article 36 violations); *see also Avena*, Counter-Memorial of the United States, at 288-90 (Mexico failed to provide a single example of a state practice of reconsidering convictions based on consular-notification); *Canada v. VanBergen*, 261 A.R. 387, 390 (2000) (rejecting legal challenge to extradition from Canada based on Article 36); *R. v. Abbrederis*, [1981] 36 A.L.R. 109 (Australia), 122-23; *Re Yater*, "Judicial Decisions," 1976 Ital. Y.B. Int'l Law, at 336-39, Vol. II (decided by Italy's Court of Cassation Feb. 19, 1973).

Although some courts have stated in passing that Article 36 creates an "individual right," international practice has not changed since the *Avena* decision. At least two courts have refused to apply the ICJ's judgment as a basis for revisiting a conviction—including a court in Germany, the party that brought *LaGrand* in the first place. *See* BGH 5 StR 116/0 decided on 7 Nov. 2001, available at http://www.bundesgerichtshof.de (Germany); *see also R. v. Partak*, [2-1] 160 C.C.C. (3d) 553, 570 (Canada). There is thus a divergence between the diplomatic positions of foreign countries and the effect given to the Vienna Convention in actual judicial decisions.

Sanchez-Llamas suggests that the Canadian courts have recognized an individual right that applies in criminal proceedings by citing *Khadr v. Canada*, 123 C.R.R. (2d) 7, 23 (Fed. Ct. 2004) (Canada). Sanchez-Llamas Merits Br. at 27-28. *Khadr* was a suit by the parents of a Canadian national attempting to force the Canadian government to provide consular services to a Canadian citizen, who had been detained outside of Canada, under *a statute* prescribing the obligations of Canadian consuls. *Id.* at 19. The *Khadr* court used the Vienna Convention to inform its analysis of a Canadian statute, not as a basis for its decision. *Id.* at 26.[11]

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11. The countries that have applied the Vienna Convention to criminal convictions have done so based on internal statutes mandating that result. *See* NACDL/LCA Br. at 16-20 (discussing Part 1(C), Section 23P, of the Crimes Act 1914). As the NACDL's brief recognizes, the countries that apply an exclusionary rule based on the Vienna Convention all do so by statute, not based on the treaty itself. *Id.* at 17 n.11. None has applied *Avena*'s holding to revisit a criminal conviction. Nor have the United Kingdom's courts—which govern criminal procedure under their separate common-law authority rather than by application of a written constitution—applied an exclusionary rule based on Article 36. *See id.*, at 20. Rather, two U.K. trial courts have excluded evidence under their general common-law power to do so. *R. v. Bassil and Mouffareg* (1990)

In short, the Court should not interpret the *amicus* briefs filed by various foreign countries as a statement of those countries actual practice. Neither Petitioners nor Petitioners' *amici* cite even a single instance in which a foreign court has directly applied the Vienna Convention to collaterally attack or void a criminal conviction. *E.g.*, Mexico *Amicus* Br., at 7-30 (discussing in theory the application of Article 36 in U.S. courts, but not discussing Mexico's actual domestic practice). Indeed, Mexico's position in this case marks a reversal of its longstanding position that Article 36 violations should not be the basis for reversing criminal convictions.[12]

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28 July, Acton Crown Court HHJ Sich (reported in Legal Action 23, December 1990); *R. Van Axel and Wezer* (1991) 31 May Snaresbrook Crown Court, HHJ Sich (reported in Legal Action 12, September 1991). To the extent that courts in the United States retain such common-law power given the tendency to adopt statutory regimes governing criminal procedure, plenary authority to adopt such exceptions rests with the States and not with the Court, save for rights conferred by the federal constitution. *See infra*, part III.A.

12. Mexico's litigation posture in *Avena* was a reversal of its traditional position on the subject. The 1976 Treaty on the Execution of Penal Sentences, Nov. 25, 1976, Mex.- U.S., 28 U.S.T. 739, at Mexico's explicit insistence, provides for enforcement of Mexican convictions with no mention of Mexico's Article 36 violations. Mexico, in recognizing its own poor record in complying with Article 36, stated that "we cannot.... expect that irregularities will not occasionally be committed." Letter from Alfonso Garcia Robles, Foreign Minister of Mexico, to Henry A. Kissinger, Secretary of State of the United States of America (Mar. 25, 1976). Mexico's federal law governing consular-notification provides no judicial remedy for individuals, only a consular-notification requirement. LEYES Y CODIGOS DE MEXICO, C.F.P.P., art. 128.IV (1995) ("Si se tratare de un extranjero, la detencion se comunicara de inmediato a la representacion diplomatica o consular que corresponda." ("In the case of an alien, the fact that he has been placed in custody shall be reported

**B. The ICJ's decisions do not provide a "rule of decision."**

*Amici* ICJ Experts go one step further than the litigants and argue that *Avena* and *LaGrand* create a "rule of decision" that this Court has no power to disregard. ICJ Experts *Amicus* Br. at 20. They argue that the Optional Protocol to the Vienna Convention transforms the ICJ's judgments into part of the treaty, and that as a result the ICJ's decision is incorporated into United States law by the Supremacy Clause. However, the decisions of international tribunals are not themselves "treaties", nor do they fall within the other two categories of federal law—the "Constitution" and "Laws of the United States." U.S. CONST. art. VI, cl.2. The ICJ's decisions, by themselves, cannot create an individually enforceable right that requires reconsideration of a criminal conviction.

**1. The only potential legal basis for deferring to the ICJ's decisions was the Optional Protocol, from which the United States has withdrawn.**

The only potential basis for the Experts' position is the Optional Protocol to the Vienna Convention, a provision that refers disputes over the treaty to the ICJ. See OPTIONAL PROTOCOL TO THE VIENNA CONVENTION ON CONSULAR RELATIONS CONCERNING THE COMPULSORY SETTLEMENT OF DISPUTES, Apr. 24, 1963, 21 U.S.T. 77 (138a). By a letter deposited with the U.N. Secretary General on March 7, 2005, the United States has withdrawn from the Optional Protocol, and is no longer subject to its provisions. *See* http://travel.state.gov/news/news_2155.html (last visited January 24, 2006). The Experts merely assert their opinion that the United States' withdrawal from the Protocol was incorrect, without citing any authority. ICJ Experts *Amicus* Br. at 19-20.

And even if the United States remained a party to the Optional Protocol, it would be inappropriate under the Constitution for the

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immediately to the appropriate diplomatic or consular mission.")).

Court to recognize as binding the decision of a judicial body not recognized in the Constitution. The "judicial Power" discussed by the Constitution encompasses the duty to exercise the final say in the interpretation of federal law. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 777 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Under the Experts' interpretation, as a result of signing the Vienna Convention, the "judicial Power" has been placed not in "one supreme Court," but instead divided between this Court and the ICJ. To recognize the ICJ's judgments as binding would, pursuant to the actions of only the President and the Senate, effect a fundamental change in the constitutional structure.

Nothing in the President's foreign-affairs and treaty power allows a reordering of the judicial functions of the Article III courts that would otherwise be barred by the Constitution. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1870) ("[A] treaty cannot change the Constitution."). The Optional Protocol, even when it remained in effect, could not have transformed the ICJ's decisions into federal law. That result would encroach on the judicial system of the United States, and would elevate the power of the ICJ far beyond that provided by its statute and the U.N. Charter.

**2. The ICJ's jurisdiction is limited to disputes between consenting nations, and its decisions are enforceable only through the Security Council.**

The ICJ's decisions in *Avena* and *LaGrand* should not be applied by this Court in construing the Vienna Convention. The U.N. Charter and the ICJ's statute together delineate the scope of the ICJ's authority. The ICJ can hear only disputes between nations, and then only when those nations have consented to the ICJ's jurisdiction. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 34, 111, 59 Stat. 1055 (1945). ICJ decisions have binding force only between the parties, which must be sovereign nations, and only with respect to the particular dispute, *id.* art. 59. Indeed, the ICJ

statute specifies that, in all other instances, decisions of the court have "no binding force."[13] *Id.*

As a result, the ICJ cannot declare individual rights. Its decisions have no *res judicata* effect on disputes between individual persons. *See, e.g.*, *Socobel v. the Greek State*, 30 Avril 1950, 18 I.L.R. 3. ICJ judgments are "final and without appeal," but there is no rule regarding the application of those decisions before other tribunals. ICJ STATUTE art. 60.

Nor does the ICJ have direct enforcement powers. Instead, the Security Council enforces ICJ judgments in its discretion. Article 94 of the U.N. Charter explicitly provides that all disputes regarding ICJ decisions are to be referred to the U.N. Security Council. U.N. CHARTER art. 94. Thus, while there exists in principle an obligation to respect the ICJ's judgments, ultimate enforcement power is given not to the ICJ—which in effect has authority merely to make declarations that include the scope of damages resulting from a breach of international law—but to the Security Council which exercises the political and institutional authority to enforce the ICJ's decisions.

Significantly, no nation has ever inferred from Article 94(1) an obligation to enforce ICJ decisions as domestic law.[14] Indeed, this

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13. *Amici* ICJ Experts sole argument on this point is that the limitation does not apply to ICJ decisions because the ICJ itself has chosen to ignore it. ICJ Experts' *Amicus* Br. at 25-26.

14. Although many foreign cases are unreported, the only case the *amici* States' research has uncovered where a domestic court arguably applied an ICJ decision was in French-controlled Morocco (a legal entity no longer extant). *See Administration des Habous v. Deal*, 19 I.L.R. 342 (Morocco, Ct. App. Rabat. 1952)—a decision later rejected by a tribunal in French-controlled Tunisia, *see Mackay Radio & Tel. Co. v. Lal-la Fatma Bent si Moahamed el Khadar et al.*, 21 I.L.R. 136 (Tangier, Ct.

interpretation of the enforceability of the ICJ's decisions in U.S. courts was expressly rejected byt he D.C. Circuit in *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (CADC 1988) (Mikva, J.) (quoting *Diggs*, 555 F.2d, at 851 (CADC 1976)): "[T]he words of Article 94 'do not by their terms confer rights upon individual citizens; they call upon governments to take certain action.'" The ICJ Experts implicitly recognize this in their brief—rather than offer a legal basis for their argument, they rely upon their assessment of the United States' "economic and political interests." ICJ Experts *Amicus* Br. at 17-19 & n.30.

The ICJ's statute confirms that its decisions have not created rights judicially enforceable by individuals. The ICJ's decisions have binding force only between the parties and with respect to their particular case. See ICJ STATUTE art. 59. Only Nations may be parties in cases before the ICJ, *id.*, at art. 34, ¶1. The ICJ's decisions cannot, by its statute, apply in litigation regarding individuals. *See Comm. of United States Citizens Living in Nicaragua*, 859 F.2d, at 938 (U.N. Charter's provisions "make clear that the purpose of establishing the ICJ was to resolve disputes between national governments. We find in these clauses no intent to vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government."); *see also Socobel*, 18 I.L.R. 3 (ICJ judgments cannot have *res judicata* effect in domestic courts because there is no identity of parties); *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum*, 13 F.R.D. 280, 290-91 (D.D.C. 1952) (refusing to give controlling effect to ICJ ruling).

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App. Int'l Trib. 1954).

### C. The Court Should Not Defer to the ICJ Out of Comity.

The dissent in *Medellin v. Dretke* suggested that an issue facing the Court was whether to accord judicial comity to the ICJ's decisions. 125 S.Ct. 2088, 2092-93 (2005) (per curiam). There is no basis for extending judicial comity to the ICJ: comity is not automatically extended to foreign tribunals *qua* tribunals; instead, it is a voluntary observance of the right of foreign nations to regulate their own affairs. *See Hilton v. Guyot*, 159 U.S. 113, 166 (1895). Applying comity is "a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another." *Somportex Ltd. v. Philadephia Chewing Gum Corp.*, 453 F.2d 435, 440 (CA3 1971). More specifically, "judicial comity" is a doctrine whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, *e.g.*, *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 423 (1866), as distinguished from "prescriptive comity," the respect sovereign nations afford each other by limiting the reach of their laws, *e.g.*, *F. Hoffman-La Roche v. Empagram S.A.*, 124 S.Ct. 2359, 2366-67 (2004); *see also* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §38 (1834) (distinguishing between the "comity of the courts" and the "comity of nations," and defining the latter as "the true foundation and extent of the obligation of the laws of one nation within the territories of another").

Neither form of comity should apply to the ICJ, which does not represent the political choices of a sovereign, but instead constitutes a dispute-resolution mechanism which ultimately culminates in a political—rather than a legal—resolution of diplomatic disputes. Judicial comity is simply inapposite to this case, because the interpretation of treaties is in the Court's own jurisdiction. A treaty is federal law. This Court has full competence to construe it according to its terms—and need not look to a foreign tribunal for guidance. *See, e.g.*, *El Al Israeli Airlines*, 525 U.S., at 167-68 (construing rule of decision provided in Warsaw Convention); *cf.*

*Hagen v. Utah*, 510 U.S. 399, 422-23 & n.1 (1994). The situation is completely different from extending comity to a foreign sovereign's application of *its own law* in its own territory. When "judicial comity" is applied to another nation's laws, the decision is made on the basis of equality between sovereign nations. *Republic of Austria v. Altmann*, 541 U.S. 677, 688-89 (2004) (discussing *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 145-46 (1812)).

Additionally, although the ICJ's work often concerns treaties, it is tied to no political decision-making process—and to none of the accompanying political responsibilities—that would ensure that these "experts" had been given legitimate authority to impose their conclusions. *See Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2761 (2004) (the Court's authority to recognize legal standards arising in international law is limited to objectively established standards because the Court otherwise has no authority to adopt policy); *cf. id.*, at 2771-72 (Scalia, J. dissenting) (arguing that this standard is too lenient because it still gives courts authority to create law).

## III. The Vienna Convention Does Not Preclude the Application of Virginia's Statutory Procedural-Default Requirements.

If the Court were to adopt a rule that Article 36 of the Vienna Convention both applies to criminal proceedings and is not subject to procedural default, it would be adopting a new rule of law. *Cf. Medellin*, 125 S.Ct., at 2091 (whether Article 36 bars procedural-default argument may constitute a "new rule").

Recognizing an exception to the procedural-default doctrine would be inconsistent with this Court's traditional recognition that it does not sit in review of the States' regulation of their own criminal-justice systems. The Court should not consider the policy arguments made by Petitioners and their *amici*—to do so would be to turn on its head the relationship between the federal and state

courts regarding criminal procedure, and the only basis for doing so would be a treaty that the Executive Branch believes should not be so applied.

### A. Procedural Default Is an Adequate and Independent State Ground.

Procedural default is an adequate and independent ground support for the Virginia Supreme Court's judgment, *Wainwright v. Sykes*, 433 U.S. 72 (1977). The Court has already resolved that issue with regard to the Vienna Convention in *Breard*, holding that the procedural rules of the forum State, including rules on procedural default, govern implementation of the Vienna Convention. 523 U.S., at 375. The Court reasoned that this result was consistent with the background presumption of international law stating that the procedural rules of the forum State govern implementation of a treaty absent "a clear and express statement to the contrary." *Id.* Thus, Article 36 rights, if they exist, "shall be exercised in conformity with the laws and regulations of the receiving State," and Article 36(2) reinforced, rather than replaced, the procedural-default rule.

Bustillo relies on Article 36(2)'s requirement that laws of the forum state "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Bustillo Merits Br. at 36-38. But this reading presumes that the more general "full effect clause" overrides Article 36's more specific provision that the Convention will be applied "in conformity with" existing United States law. It cannot be that the more general provision creates a "clear and express statement" that the United States intended to change its own domestic laws by signing a treaty stating that the requirements of the Convention were to be enforced in compliance with existing law.

### B. The Court Should Not Consider the Policy Arguments Advanced by Petitioners and their *Amici*.

The Court holds "no supervisory power over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Smith v. Philips*, 455 U.S. 209, 221 (1982). Nonetheless, Bustillo argues that the Court should preclude the application of procedural default on policy grounds; in short, suggesting that the Court change U.S. law because it will make the treaty function more efficiently and because the Court should follow the ICJ's "guidance" regarding the interpretation of Article 36. Bustillo Merits Br. at 37-50. The Court should not consider these policy arguments, because they are within the Executive Branch's discretion.

Appending additional procedural requirements onto Article 36 would violate the Court's own precedent regarding procedural default. Procedural default prevents the subsequent enforcement of even constitutional rights, which can likewise be defaulted. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) (procedural default applies to *Miranda* claims); *Sykes*, 434 U.S. at 87 (procedural default applies to voluntariness claims). The application of that rule to constitutional claims does not mean that the constitution is not given full effect under United States law; the possibility that procedural default will be applied to Vienna Convention claims, likewise, cannot be sufficient to demonstrate that Article 36 is not being given full effect.

To rule for Petitioners, the Court would have to disregard its own opinions regarding the procedural-default doctrine in the context of federal habeas claims. The procedural-default rule is designed in part to eliminate the tactical benefit that might be derived from the stratagem of "sandbagging" by a criminal defendant. *Sykes*, 433 U.S., at 89. Rejecting the prior test of *Fay v. Noia*, 372 U.S. 391 (1963), which allowed federal habeas review for any claim absent a knowing and deliberate waiver of the claim,

the Court emphasized the importance of applying the "cause"and "prejudice" standard in cases involving the application of the contemporaneous-objection rule. *Sykes*, 433 U.S., at 89.

A broad rule preventing procedural default of Vienna Convention claims would be even broader than the now-repudiated standard in *Fay v. Noia*. Even in the case of "deliberate bypass," Bustillo argues that Vienna Conventions claims should remain available. *See* Bustillo Merits Br. at 36-38. Indeed, in Bustillo's State habeas proceedings, Virginia cited the testimony of Bustillo's defense counsel, who stated that he *affirmatively chose* not to involve the consulate in Bustillo's case. J.A., at 235. The choice not to invoke the Vienna Convention is the source of the current dispute. As a general matter, Vienna Convention claims would present particularly likely candidates for sandbagging, to the significant detriment of the judicial process. For defendants from nations whose consulates provide little assistance to nationals facing criminal prosecution, the upside to raising the claim is nominal. But, if the claim cannot be waived, defendants could go to verdict, hope for acquittal, and, if convicted, assert the claim and get yet another bite at the apple. Moreover, if Petitioners prevail, the result would call into question the convictions and sentences of potentially tens of thousands of defendants, capital and non-capital, throughout all 50 States.

## CONCLUSION

The Court should affirm the judgments of the Oregon and Virginia Supreme Courts.

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